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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY.

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THE BLAKELY-GARDNER PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
The Importance of Certiorari Here	1
The Decisions of the Court of Appeals Positively Demonstrate a Misconception of Its Functions	3

CITATIONS.

Cases.

Barrett v. Chicago & N. W. Ry. Co., 207 F. 2d 5	5
Bernier v. I. C. R. R. Co., 296 Ill. 464, 129 N. E. 747	5
Carter v. Hennes Trucking Co., 210 F. 2d 443	5
C. & A. R. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063	4
Colas, et al. v. Grzegorek, 207 F. 2d 705	5
Fiedler v. C. & N. W. Ry. Co., 204 F. 2d 515	3, 4
Heller v. Select Lake City Theatre Co., 187 F. 2d 649	3
Hill v. Ry. Express Agency, 187 F. 2d 184	3
Hunter Packing Co. v. B. & O. R. Co., 210 F. 2d 448	5
Kaminski v. Chicago River & Ind. R. Co., 200 F. 2d 1	4
Koch v. C. & N. W. Ry. Co., 208 F. 2d 152	5
Kuchin v. C. & N. W. Ry. Co., 210 F. 2d 863	5
Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N. E. 2d 74	2
Pearson v. B. & O. R. Co., 200 F. 2d 569	4
Petermichl v. C. & N. W. Ry. Co., 205 F. 2d 434	4
Pringle v. G. M. & O. R. Co., 212 F. 2d 632	5
Schroeder v. Minn., St. P. & S. S. M. R. Co., 204 F. 2d 758	4
Stephens v. Sears Roebuck & Co., 212 F. 2d 260	5
Stone v. N. Y. C. & St. L. R. Co., 344 U. S. 407	5
Wadiak v. I. C. R. Co., 208 F. 2d 925	5
Wetherbee v. E. J. & E. R. Co., 204 F. 2d 755	4
Wilkerson v. McCarthy, 336 U. S. 53	4

INDEX.

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REPLY.

I.

The Importance of Certiorari Here.

Respondent states that though error had been committed by the court of appeals, such is no warrant for certiorari (p. 17).

It overlooks the real issue, namely, whether in a diversity action a federal court can employ a concept of negligence different from that employed by the Supreme Court of the state in which the action arises and wherein the federal court sits.

This case involves not only Kuchin. It concerns every litigant seeking a jury trial in a negligence action—that type of case which today constitutes most of the litigation on the law side of the civil docket. If in a diversity action a federal court in this district can employ a definition of negligence narrower than that recognized by the highest court of Illinois, the remedy will be determined by the particular court in which the litigant seeks his remedy.

But there is more. There is that encroachment upon the function of the jury so classically demonstrated when a court undertakes to state what is negligence and discards the specific findings of a jury.

Was there evidence of negligence? Here petitioner was in a *public* place where he had a right to be (R. 117, 118, 119). Here he was on a path used by the public for many years (R. 12, 16, 23, 25, 26, 27). Here respondent's employees knew of the public character of the path, and its use by children and adults (R. 81). Here he was struck down by a bar protruding from a box car operated by respondent, *a fact specifically demonstrated by a special verdict* (R. 130). Here the cars were to be inspected before leaving respondent's yard prior to the accident. Here, upon inspection after the accident, one was found to be in "bad order" and should not have been in use. Here, indeed, there was evidence that it was in "bad order" in the yard before the inspection (R. 77).

The court of appeals said that was not negligence. The Illinois Supreme Court in the recent (January, 1954) case of *Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74, 117 N. E. 2d 74, has this to say about the function of the jury on what is, or is not, negligence:

> "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and

both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function. *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350." (p. 84.)

II.

The Decisions of the Court of Appeals Positively Demonstrate a Misconception of Its Function.

Rule 19 of this court provides that certiorari will be granted where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision * * *."

The court of appeals, it is fundamental, has limited functions.

We cited cases in which verdicts had been set aside. Respondent is technically correct when it states that all of them were not reversed on the ground of want of negligence. The fact remains, however, that the plaintiff was denied a recovery. Three, we assure the court, were inadvertently put in this list.*

* *Heller* v. *Select Lake City Theatre Co.*, 187 F. 2d 649. Directed verdict for defendant reversed.

Fiedler v. *C. & N. W. Ry. Co.*, 204 F. 2d 515. Verdict for plaintiff affirmed.

Hill v. *Ry. Express Agency*, 187 F. 2d 184. New trial granted defendant.

Respondent has sought to nullify this situation by appendices. However, that there can be no question,—look at what has occurred in negligence cases reported from 200 F. 2d (November, 1952) until ~~the present~~ Aug. 23, 1954 in the Seventh Circuit.

Vol. 200 F. (2nd).

Kaminski v. *Chicago River & Ind. R. Co.*, 200 F. 2d 1. Plaintiff conductor fell through an empty coal pit which had been covered. Employee's verdict reversed. (But see *Wilkerson* v. *McCarthy*, 336 U. S. 53.)

Pearson v. *B. & O. R. Co.*, 200 F. 2d 569. Recovery for plaintiff affirmed in crossing accident where defendant's signal was not working.

Vol. 204 F. (2nd).

Fiedler v. *C. & N. W. Ry. Co.*, 204 F. 2d 515. Judgment for plaintiff passenger on defendant's railroad affirmed.

Wetherbee v. *E. J. & E. R. Co.*, 204 F. 2d 755. A directed verdict in a death action under the FELA affirmed on insufficiency of evidence of negligence.

Schroeder v. *Minn., St. P. & S. S. M. R. Co.*, 204 F. 2d 758. Trial court's holding in automobile and freight train collision that sole proximate cause of accident was negligence of motorist affirmed.

Vol. 205 F. (2nd).

Petermichl v. *C. & N. W. Ry. Co.*, 205 F. 2d 434. Directed verdict against plaintiff passenger in attempting to board moving train affirmed. (But see *C. & A. R. R. Co.* v. *Gore*, 202 Ill. 188, 66 N. E. 1063, which is directly contrary.)

Vol. 207 F. (2nd).

Barrett v. *Chicago & N. W. Ry. Co.*, 207 F. 2d 5. Plaintiff, standing on defendant's platform, caught in suction of passing train. Judgment for plaintiff reversed (one judge dissenting). (But see *Bernier* v. *I. C. R. R. Co.*, 296 Ill. 464, 29 N. E. 747.)

Colas, et al. v. *Grzegorek, et al.*, 207 F. 2d 705. Judgment for defendant reversed and plaintiff given new trial because answers of jury to special verdict inconsistent.

Vol. 212 F. (2nd).

Pringle v. *G. M. & O. R. Co.*, 212 F. 2d 632. Judgment for plaintiff reversed.

Koch v. *C. & N. W. Ry. Co.*, 208 F. 2d 152. Directed verdict for defendant affirmed on ground of contributory negligence.

Wadiak v. *I. C. R. Co.*, 208 F. 2d 925. Judgment for employee in FELA action reversed. (But see *Stone* v. *N. Y. C. & St. L. R. Co.*, 344 U. S. 407 which is contrary.)

Carter v. *John Hennes Trucking Co.*, 210 F. 2d 443. Judgment for plaintiff affirmed.

Hunter Packing Co. v. *B. & O. R. Co.*, 210 F. 2d 448. Judgment for plaintiff reversed on ground of insufficiency of evidence of negligence.

Kuchin v. *C. & N. W. Ry. Co.*, 210 F. 2d 863. Judgment for plaintiff reversed on insufficiency of evidence of negligence.

Stephens v. *Sears Roebuck & Co.*, 212 F. 2d 260. Judgment notwithstanding the verdict of jury affirmed on ground of insufficiency of evidence of negligence.

Thus, from 200 F. 2d to August 23, 1954, out of fourteen decisions, eleven have been reversed or directed verdicts for defendants affirmed. *Recoveries have been allowed to stand in but only three cases.* Thus, almost 80% of all cases from November, 1952 to August 23, 1954 have resulted favorably for defendant by virtue of reversal of verdicts or affirming trial court's direction of verdicts.

Indeed, trial courts are loath to allow verdicts for plaintiffs to stand because of a constant fear of reversal—a condition which exists in no other circuit.

Respondent's answer reeks with personal references to petitioner's counsel. We realize this court is not interested in such matters. We realize, too, that such is not an issue. Moreover, petitioner's counsel will stand on his own record.

Respectfully submitted,

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INDEX.

	PAGE
Petition for Rehearing of Order Denying Petition for Certiorari	1
Lavender v. Kurn, 327 U. S. 645 Controlling	7
Certification	10
Appendix	
Illinois Supreme Court Opinion in Pitrowski v. N.Y., Chicago & St. Louis R. Co., ... Ill. ...., ... N. E. 2d .... decided September 23, 1954	11

CITATIONS.

Bolling v. Sharpe, 98 S. Ct. 591	6, 7
Briggs v. Elliott, 98 S. Ct. 583	6
Brown v. Bd. of Education, 98 S. Ct. 583	6
Davis v. County School Bd. of Prince Edward County, 98 S. Ct. 583	6
Erie v. Tompkins, 304 U. S. 64	5
Gebhart v. Belton, 98 S. Ct. 583	6
Lavender v. Kurn, 327 U.S. 645	7,8,9,10
Lindroth v. Walgreen Co., 407 Ill. 121, 94 N. E. 2d 847	8, 9
Pitrowski, Adm. v. N. Y., Chicago & St. Louis R. Co., ... Ill. .... , ... N.E. 2d ...., decided 9/23/54	2,10
Pitrowski v. N. Y., Chicago & St. Louis R. Co., 1 Ill. App. 2d 63, 116 N. E. 2d 173	3
Wetherbee v. E. J. & E. Ry. Co., 191 F. 2d 302	3, 4
Wetherbee v. E. J. & E. Ry. Co., 204 F. 2d 755	4

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On October 14, 1954, this Court entered the following order on Petitioner's Petition for Certiorari:

"The petition for writ of certiorari is denied."
"Mr. Justice Black and Mr. Justice Douglas are of the opinion the petition should be granted."

In accord with Rule 58 of this Court, Petitioner desires to call the Court's attention to intervening circumstances of substantial or controlling effect.

On September 23, 1954, the Illinois Supreme Court filed an Opinion in Cause No. 33177 Entitled Pitrowski, Administrator v. The New York, Chicago & St. Louis Railroad Company. This Demonstrates Why Certiorari Should be Granted Here.

The *Pitrowski* opinion (attached hereto as an appendix, since it is not yet published) graphically illustrates that the concept of the Court of Appeals as to what is evidence of negligence is at loggerheads with and directly contrary to that of the Illinois Supreme Court—the Court whose definition controls in this diversity case. A consideration of this opinion, together with an opinion of the Court of Appeals in an identical situation, reveals a most unwholesome and discriminatory condition. A litigant can recover on the same case, if he be in the courts of Illinois, but will be denied relief should he be in a United States District Court in this state.

In the *Pitrowski* case, it appeared that plaintiff's decedent was killed while switching on the tracks of the Bell Fibre Products Company, an industry. Two boxcars were being pushed in a northerly direction by a locomotive, with the decedent riding on the east side of the most northerly car. The yard conductor preceded the cars and locomotive to a point where the train entered the plant. As the train went north, it passed into a "tunnel" made by the sides and overhang of an adjoining building.

The cars were derailed when they struck a "dolly" on the track. It was 10 or 12 inches high and 7 or 8 feet long and was used by the industry in its work.

There was no evidence as to when the dolly was placed on the track or how long prior to the accident it had been there.

The defendant was required to maintain the industry tracks under the terms of its agreement with the Bell Fibre Products Company.

Plaintiff administrator obtained a judgment in the Circuit Court of Cook County, and the Appellate Court of Illinois, First District, (1 Ill. App. 2d 63, 116 N.E. 2d 173) reversed that judgment. However, the Supreme Court of Illinois held that there was an issue of fact for the jury.

But consider *Wetherbee* v. *E. J. & E. Ry. Co.*, decided by the Court of Appeals for the Seventh Circuit, 191 F. 2d 302, 204 F. 2d 755, certiorari denied, 346 U.S. 867, Mr. Justices Black and Douglas being of the opinion that the writ ought to be allowed.

There, as in the *Pitrowski* case, plaintiff's decedent was a switchman, riding the lead end of two boxcars which were being pushed on a track within the premises of an industry. Adjacent to the track was a concrete loading dock about 4 feet high and 108 feet long. There was a clearance of approximately 5½ feet between the wall and the rail. The railroad car hit a plank on the track and became derailed, causing the death of plaintiff's decedent.

Indeed, there was more for the plaintiff in the *Wetherbee* case. It appeared that prior to the movement, Venske, the switchman, had preceded the train, thrown the switch and had signaled it to come ahead. There was a verdict on the first trial, and, in reversing and remanding it, the Court of Appeals held there was no issue of negligence, except the conduct of Venske, whose testi-

mony as to whether he saw anything obstructing the track was obscure. (191 F. 2d 302, 308.)

On the retrial "As might be expected, however, the testimony of the remaining member of the crew, Venske, was much more detailed * * * " (*Wetherbee* v. *E. J. & E. Ry. Co.,* 204 F. 2d 755, 757.)

It was held that there could be nothing to support giving the case to the jury, and the Court of Appeals affirmed a verdict by the District Court. (*Wetherbee* v. *E. J. & E. Ry. Co.,* 204 F. 2d 755.)

The absolute contradiction between the two cases is patent from the facts themselves. But, consider for a moment the disparity in legal principles between the two decisions.

Here the Court of Appeals held, as a matter of law, that there was no evidence of negligence on the part of the defendant, because the man who preceded the train testified he was not in a position to see a plank on the track. But in the *Pitrowski* case, the Illinois Supreme Court *held there was a duty on the part of the defendant to know the condition of the track before shoving cars into it.*

Then, too, the Court of Appeals held there was no evidence of failure to provide a safe place to work, since any such failure was due to the plaintiff's decedent's conduct. (191 F. 2d 302, 310.) But the Supreme Court of Illinois, in the *Pitrowski* case, held specifically:

> *"Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury."* (Italics ours.)

How can the two opinions be reconciled? Had Mrs. Pitrowski filed her case in the United States District Court and obtained a verdict, and the Court of Appeals were to adhere to the *Wetherbee* case, recovery would have been denied her. On the other hand, if Mrs. Wetherbee had filed her case in the State Court, she would find respect for her right to a jury determination on the issue of negligence.

In the State of Illinois there are 8,712,176 citizens.* Each of these is a potential litigant. Each of these may some day be confronted with the problem of seeking reparation for an injury or death. If he finds himself in a Federal Court of this State, he will be at a distinct disadvantage, and the party against whom the action is brought will enjoy greater privileges than the law accords. This, of course, raises questions involving basic constitutional rights of due process and equal protection of the laws. Due process of law cannot consistently assume one shape in a State Court and another in a United States Court in the same State.

This was your reasoning in *Erie* v. *Tompkins*, 304 U.S. 64. You pointed out that:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. *It made rights* enjoyed under the unwritten 'general law' *vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law.*" (pp. 74, 75.) (Italics ours)

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* 1950 Census. Census Bureau, Washington, D. C.

When it is remembered that the non-citizen railroad removed this cause from the Circuit Court of Lake County, Illinois, where it had been commenced, to the United States District Court on the basis of diversity of citizenship, (Rec. 2) this reasoning becomes especially pertinent here. **Had the cause remained in the State Court, one must perforce conclude from the opinions of the Illinois Supreme Court that the issues of defendant's negligence would be for a jury.**

This grotesque condition is not, as the records indicate, confined to this instance. It is a hazard every litigant in this Circuit must recognize in ascertaining where to lodge his case and how to prevent a non-resident defendant from selecting the court in which he will be given a special consideration.

This Court has concerned itself with the questions of due process and equal protection of the laws, those clauses of the Federal Constitution in which are found the basic personal rights. But is there any greater denial of equal protection effected, when a state-defined right is so interpreted by a state court as to allow reparation, but is refused recognition in the federal forum? The effect of this violation of the due process clause of the Fifth Amendment is more far reaching than the problem presented by discrimination because of color in educational institutions.*

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* Brown v. Board of Education of Topeka, 980 S.Ct. 583, Briggs v. Elliott, 98 S. Ct. 583; Davis v. County School Board of Prince Edward County, 98 S.Ct. 583, and Gebhart v. Belton, 98 S.Ct. 583; Bolling v. Sharpe, 98 S. Ct. 591.

It concerns whether there shall be a remedy for a wrong. For Mrs. Wetherbee and her four children it meant that a jury's verdict in the sum of $80,000 was reversed and finally she was left remediless. To others like Frank Kuchin, it means that such personal rights as freedom from injury with resulting loss of constitutional liberty* can be violated with impunity.

This, we submit, is as momentous a constitutional question as comes to this Court.

II.

Lavender v. Kurn, 327 U.S. 645, *Controls Here, Moreover, it has Been Adopted* by the Illinois Supreme Court in Defining What *Constitutes Evidence of Negligence.*

The Illinois Supreme Court, in Pitrowski, Admr. v. The New York, Chicago & St. Louis Railroad Company, as late as September 23, 1954, stated that Lavender v. Kurn, 326 U.S. 645, was a determining authority as to what constitutes evidence of negligence. In *Lavender* v. *Kurn*, 327 U.S. 645, the decedent, a switch tender, was found lying on the ground north of the track near a switch after a train had backed in a westerly direction. He had been struck in the back of the head. His body lay in a northerly and southerly direction, and the left side of his face was bruised. His head was 5½ feet north of the tracks and he lay somewhere between 2 to 14 feet west of the switch. It was plaintiff"'s theory that he was struck by the end of the mail hook hanging down on the outside of the mail car of the backing train. The overhang of the mail car was 2 to

* "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." (Bowling v. Sharpe, 98 S. Ct. 591)

2½ feet. When it swayed around a curve, the hook might pivot, so that its curled end might swing out 12 to 14 inches. East and west of the switch was an uneven mound of cinders between 18 and 24 inches above the rails.

It was plaintiff's theory that the decedent had been standing on the mound about a foot from the side of the mail car and was hit by the end of the mail hook. No one saw the accident. The Supreme Court of Missouri reversed a judgment in favor of the plaintiff on the ground that there was no evidence of negligence. This Court, with only one Judge dissenting, held that if plaintiff's decedent were struck by an object projecting from the side of a railroad car, such fact constituted evidence of negligence.*

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* "The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury." (Lavender v. Kurn, 327 U.S. 645, 652.)

The Supreme Court of Illinois, in *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, a common law negligence action, held *Lavender* v. *Kurn, supra,* controlling on the all important principle as to what constitutes evidence of negligence.*

Thus, when the Illinois Supreme Court itself declares that if a person is struck by an object protruding from a railroad car, such is evidence of negligence to be submitted to the jury, how can the Court of Appeals hold there is no evidence of negligence in this case?

It is respectfully submitted that eventually this Court must intervene to protect the basic rights of citizens in this Circuit.

Granting certiorari here and re-defining the function of the Court and the function of the jury will have a

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* "In Lavender v. Kurn, 327 U.S. 645, 35 S. Ct. 740, the deceased, a switch tender, was found dead alongside defendant's railroad tracks. The evidence showed he had been struck in the head by some object which fractured his skull and caused his death. There was no eyewitness. It was shown that during the time that deceased was at the place of his injury a train passed which was equipped with a mail hook which, if it was extended, could have struck the deceased and inflicted the injury. The question was raised as to whether the jury could reasonably infer from these facts that the hook struck and killed deceased. It was not shown that the hook was in fact extended at the time and place of deceased's injury, and it did appear that, except for an elevation in one place in the ground along the track, the hook, even if extended, was too high to have struck the deceased standing on the ground. The court held the case, on this evidence, was properly submitted to the jury, and that it would reasonably be inferred that the death was caused by the extended hook." (Lindroth v. Walgreen Co., 407 Ill. 121, 132, 133; 94 N. E. 2d 847.)

salutary effect upon the administration of justice in this Circuit.

It is respectfully submitted that the Court reconsider its order denying certiorari and grant the writ.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Petitioner.

CERTIFICATION.

James A. Dooley hereby certifies that he is counsel for the Petitioner and represented him in the District Court, the Court of Appeals and this Court; that this Petition for Rehearing is presented in good faith and not for delay.

He states that the opinion of the Illinois Supreme Court in *Pitrowski* v. *The New York, Chicago & St. Louis R. R. Co.*, Cause No. 33177, was not filed until September 23, 1954, and has not as yet been published; that the said opinion was not available to him at the time of the filing of the original petition; that he has limited this Petition for Rehearing of the Order Denying a Petition for Writ of Certiorari to an argument based upon the conflict in the law of negligence as enunciated by the highest court of Illinois and that defined by the Court of Appeals for the Seventh Circuit and the resulting Constitutional problems from such conflict; he states he refers to *Lavender* v. *Kurn*, 327 U.S. 645, since the said case was cited with approval by the Illinois Supreme Court in the *Pitrowski* decision.

APPENDIX.

Docket No. 33177—Agenda 32—May, 1954.

Ruth Pitrowski, Admr., Appellant, v. The New York, Chicago & St. Louis Railroad Company, Appellee.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

This action was brought in the circuit court of Cook County by Ruth Pitrowski, plaintiff-appellant, under the provisions of the Federal Employer's Liability Act (45 U.S.C.A. sec. 51 *et seq.*) against the New York, Chicago & St. Louis Railroad Company, to recover damages for the death of her husband.

At the trial, defendant introduced no evidence, but elected to stand upon its motion for directed verdict at the close of plaintiff's evidence. Defendant's motion having been denied, the cause was submitted to the jury, which returned a verdict in favor of plaintiff, and judgment was entered thereon in the amount of $100,000. On appeal, the Appellate Court for the First District reversed without remanding, holding that plaintiff had failed to prove any negligence on the part of defendant and, therefore, the trial court erred in refusing to direct a verdict for the defendant. Plaintiff's petition for leave to appeal having been allowed, the cause is now before this court for consideration.

On this state of the record, it is the duty of this court to examine the record to determine whether there is any evidence which, taken with its intendments most favorable to the plaintiff tends to support the charge of the compiaint. (*Mueller* v. *Elm Park Hotel Co.* 398 Ill. 60, 63.) Section 51 of the Federal Employer's Liability Act provides that a railroad carrier engaged in interstate commerce shall be liable in damages for any injury or

death of an employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The act also abolishes the defenses of contributory negligence and assumption of risk. Thus, the only question which we are now called upon to answer is whether there is any evidence in the record, viewed in the light most favorable to the plaintiff, to support the jury's conclusion that defendant was guilty of negligence which contributed to decedent's death, or if there is any evidence from which such negligence could reasonably be inferred. *Lavender* v. *Kurn*, 327 U.S. 645; *Bonnier* v. *Chicago, Burlington and Quincy Railroad Co.* 2 Ill. 2d 606.

The record discloses that decedent met his death at about 3:30 A.M. on October 15, 1951, while engaged in a switching operation for defendant on the industry tracks of the Bell Fibre Products Company plant in Chicago. The accident took place on the spur track which extends in a northerly direction from defendant's tracks into the Bell Fibre plant. At the time of the accident it was a dark morning and there were no lights whatever about the industry track. The switching operation consisted of two box cars which were being pushed by a Diesel locomotive in a northerly direction. Prior to the occurrence in question the engine and cars with a caboose attached had come north on defendant's main line. The caboose was left on the main line with the head brakeman protecting it. The switching movement then entered the Bell Fibre plant, and the yard conductor, Fietze, walked down the track ahead of the cars to the "entrance switch" where the track divides into a north track and an east track. When the switching movement passed Fietze onto the north track it was moving at three or four miles per hour, and decedent was riding on the east side of the lead car "in the place and manner that is customarily done." As the two cars and engine proceeded north they moved through a thirty-foot "tunnel" made by the sides and overhang of the adjoining building. The

accident occurred about fifteen feet north of the north end of the tunnel. At that time Fietze was standing east of the engine, about eighty feet from the front end of the lead car, so that he could pass signals with his lantern to the engineer to stop or proceed when he got a signal from the decedent. Fietze testified, "I did not see what happened. What attracted my attention to the happening of something is that I seen a shadow, a shadow was going against the wall. * * * There are no lights of any kind lighted at or about the sidetrack or that tunnel and when I saw the shadow appear to be going towards the wall I heard nothing. I yelled at the engineer to stop. When I yelled he stopped promptly. I can't say how far the engine went from the time I yelled until it did come to a stop. I don't recall. It went about 3 feet, 4 feet, something like that."

It is undisputed that the derailment was caused by a "dolly" which was used by the Bell Fibre Company to convey material about its plant on the railway tracks. This dolly was seven or eight feet in length and was constructed of metal angle irons. It extended ten or twelve inches above the track level and had no lights or any warning devices on it. One of defendant's rules provides: "Track foremen report to and receive instructions from the road master. They will be held responsible for the proper and economical maintenance of the track roadway and right of way on their sections and the use of labor and material furnished them. They must make frequent inspections of the section assigned to them, and know that it is in safe and proper condition." Defendant's section foreman, whose duty it was, under the above rule, to inspect and maintain the industry tracks, testified that he had seen this dolly in use on or about the industry tracks for two or three years prior to the accident, that he had never notified the industry not to use it; that he knew it had no lights or warning devices; that he never notified his superior officer that it was being used; and that he never told decedent that it was being used.

Under the agreement with the industry the defendant was required to maintain the industry tracks. The section foreman testified that he made weekly inspections of the tracks by walking over the track in the daytime, looking for objects that would foul the track. No inspection of the track was made prior to the switching operation on the night of the accident. There was no evidence as to when the dolly was placed on the track or how long it remained there prior to the accident.

Plaintiff's complaint charged defendant with the following four acts of negligence: (1) Defendant caused or allowed said car to become derailed; (2) defendant moved said car at a dangerous and excessive rate of speed; (3) defendant caused or allowed obstructions to be on the track; (4) defendant failed to furnish plaintiff's intestate with a reasonably safe place to work.

After a careful examination of the evidence, we are of the opinion that the record contains sufficient evidence to establish a reasonable basis from which the jury could conclude that defendant was guilty of the negligence charged and that such negligence contributed in whole or in part to decedent's death. Numerous rulings of the Federal courts have made it clear that to the maximum extent proper, questions in actions arising under the Federal Employer's Liability Act should be left to the jury. (*Tiller* v. *Atlantic Coast Line Railroad Co.* 318 U.S. 54, 68; *Bailey* v. *Central Vermont Railway,* 319 U.S. 350; *Tennant* v. *Peoria and Pekin Union Railway Co.* 321 U.S. 29.) In recent Illinois cases we have pointed out that "the right to trial by jury is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. [Citation.] To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a good portion of the relief which Congress has afforded them." (*Williams* v. *New York Central Railroad Co.* 402 Ill. 494, 507. Even more recently, in *Bonnier* v. *Chicago, Burlington and Quincy Railroad Co.* 2 Ill. 2d 606, we again reiterated that only where there is a complete

absence of probative facts tending to show negligence should the court take the question from the jury and decide the issue of negligence as a matter of law.

In its opinion the Appellate Court stated that "it would be a burden not compatible with the practical operation of the railroad to require that each switching movement be preceded by a track walker. The most that could be required in the exercise of ordinary care, taking into consideration practical operation of the railroad, is that an inspection be made at reasonable times and places, the frequency depending upon varying circumstances." This typifies the sort of error into which we feel the Appellate Court has fallen in this case. The question of reasonableness was one for the jury and the reviewing court should not have substituted its judgment as to what was reasonable care for the conclusion of the jury on that issue. Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury. The Appellate Court had no right to hold, as a matter of law, that defendant was under no duty to inspect before this switching operation was commenced. The jury was properly entitled to find, as it apparently did, that it was negligent for defendant to conduct the switching operation in question in an unlighted yard without first inspecting to ascertain whether the track was clear of dangerous obstacles. In *Williams* v. *Atlantic Coast Line Railroad Co.* (5th Cir.) 190 Fed. 2d 744, the court said: "The employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees." Whether defendant made proper tests and inspections in the instant case was a proper question for submission to the jury and thus it was error for the Appellate Court to reverse the verdict and judgment in favor of plaintiff.

For the foregoing reasons the judgment of the Appellate Court is hereby reversed, and the cause is remanded to that court to consider the other assignments of error which it stated were not considered upon the initial review of the case.

Reversed and remanded.